No. 73-1233

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In the Supreme Court of the United States

OCTOBER TERM, 1974

NATIONAL LABOR RELATIONS BOARD AND
PETER G. NASH, GENERAL COUNSEL, PETITIONERS

v.

SEARS, ROEBUCK AND COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. The principal contention of respondent and the *amici*[1] involves the following syllogistic reasoning:

a. The General Counsel is an "agency" under the Freedom of Information Act.

b. The advice and appeals memoranda are the final determinations made by such agency in deciding whether to institute cases.

c. The advice and appeals memoranda are therefore "final opinions * * * made in the adjudication of cases."

[1]The *amici* are the Freedom of Information Clearinghouse ("Clearinghouse"), the Chamber of Commerce of the United States, the American Civil Liberties Union and the Consumers Union of United States, Inc. The latter two organizations have filed a joint brief.

Even accepting the first two premises, the conclusion does not follow.[2]

As shown in our opening brief, the General Counsel does not adjudicate any cases under the National Labor Relations Act. His sole function is that of a prosecutor deciding whether to issue a complaint when an unfair labor charge has been filed, and, if a complaint is issued, prosecuting the case before the Board. Even if the advice and appeals memoranda are viewed as the culmination of the General Counsel's investigation and consideration of a particular case, they are not "final opinions" made in the "adjudication" of cases.

Implicit in the requirement that an agency make public "final opinions * * * made in the adjudication of cases" is that the opinions be those of the agency that is doing the adjudication. In other words, what Congress intended in Section 552(a)(2)(A) of the Freedom of Information Act was to require agencies to make public the final opinions rendered in their adjudicatory processes. Nothing in the language or the legislative history of this provision, however, suggests that Congress intended to make public rulings of a subordinate component of an adjudicatory agency where, although that component itself may be an "agency" under the Freedom of Information Act, the component is not doing the adjudicating.

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[2]The fact that an administrative body may be an "agency" for the purpose of the Freedom of Information Act does not mean that it performs adjudicative functions. See, *e.g.*, *Soucie* v. *David*, 448 F.2d 1067, 1073 (C.A.D.C.) (Office of Science and Technology); *Nichols* v. *United States*, 325 F. Supp. 130, 138 (D. Kan.), affirmed, 460 F.2d 671 (C.A. 10), certiorari denied, 409 U.S. 966 (National Archives and Records Service). Cf. *Washington Research Project, Inc.* v. *Department of Health, Education and Welfare*, 504 F.2d 238 (C.A.D.C.) (Initial Review Groups within the National Institute of Mental Health).

The advice and appeals memoranda of the General Counsel are no more "final opinions * * * made in the adjudication of cases" than would be a memorandum from the Assistant Attorney General in charge of the Criminal Division in the Department of Justice to a United States Attorney, written in response to the latter's request for authorization to institute a criminal proceeding, which authorizes the prosecution, explains the reasons for the authorization, discusses and evaluates the evidence, and analyzes the legal theories upon which the case should rest. However one may define the types of actions by the National Labor Relations Board that constitute "adjudication" under the Freedom of Information Act, the term does not include the determination whether there is probable cause to believe that the National Labor Relations Act has been violated, which the General Counsel makes when he authorizes the Regional Director to issue, or not issue, a complaint.[3]

As we explained in our opening brief (pp. 5-8), the advice and appeals memoranda represent the basic advice given by the General Counsel to the staff attorneys with respect to the initiation and conduct of litigation. They reflect the mental process by which the General Counsel and his staff attorneys have determined what further action should be taken in a case—either the dismissal of the charge or the issuance of a complaint, and, if the latter, the

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[3]Sears points out (Br. 19-20) that the Administrative Procedure Act defines "adjudication" as "agency process for the formulation of an order" (5 U.S.C. 551(7)) and "order" as "the whole or a part of a final disposition * * * of an agency in a matter other than rule making but including licensing" (5 U.S.C. 551(6)). The decision of the General Counsel on whether to institute unfair labor practice proceedings before the Board is not an "adjudication" under that Act, since his advice to the Regional Director does not constitute an "order" within the usual meaning of that term.

manner in which it should be prosecuted (App. 71). These documents are thus analogous to the "work product" of a lawyer with regard to possible litigation, which, because of the strong public interest in protecting its confidentiality, is immune from discovery except in exceptional circumstances. See *Hickman* v. *Taylor*, 329 U.S. 495.[4]

In the circumstances, to require the General Counsel to disclose advice or appeals memoranda to "any person" (see 5 U.S.C. 552(a)(3)), including the respondent,[5] would injure the consultative functions of government just as surely as would requiring disclosure of deliberations in an adjudicative agency. Clearinghouse (Br. 26-27) takes too narrow a view in contending that memoranda may harm the consultative functions of government only where dis-

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[4]Contrary to Sears' contention (Br. 22-23, n. 28), the work product privilege applies to government attorneys, no less than to private attorneys. See *J. H. Rutter-Rex Manufacturing Co., Inc.* v. *National Labor Relations Board*, 473 F.2d 223, 234 (C.A. 5), certiorari denied, 414 U.S. 822; *Thill Securities Corp.* v. *New York Stock Exchange*, 57 F.R.D. 133, 138 (E.D. Wis.).

Sears incorrectly states (Br. 3, n. 3; 16, n. 21) that the General Counsel conceded below that advice and appeals memoranda contain no "sensitive" material. In his reply brief in the court of appeals (pp. 4-5), the General Counsel stated that, "albeit the record does not contain examples of Advice and Appeals memoranda discussing such matters [trial tactics and settlement agreements], we submit that the surrounding circumstances of this case demonstrate that the class of documents sought is used to advise the staffs on such matters." Moreover, contrary to Sears' contention (Br. 10, 15), the memoranda in the record do disclose the evidence in the cases, the General Counsel's legal theories, and possible defenses (A. 83-85, 86-87, 185-187, 188-189, 194-198, 205-209, 210-212).

[5]Sears' emphasis on its interest as a charging party obscures this point. If the memoranda are to be made available under the Freedom of Information Act to a charging party, they must also be made available to charged parties, who will be respondents in an adversary proceeding if a complaint issues on the charges. This possibility exists even where a memorandum advises the Regional Director not to issue a complaint, for that decision may be reversed on appeal — as happened in this case.

closure is likely to cause subordinates to fear undue public criticism. Candid communication is equally threatened when government attorneys have reason to fear that disclosure to the respondent of the internal memoranda will harm the prosecution of the case.

Moreover, contrary to respondent's contention (Br. 16), the advice and appeals memoranda are not final and conclusive determinations by the General Counsel with respect to the precise way in which the litigation should be conducted, so that the role of the Regional Director in implementing them is merely "ministerial." When the Division of Advice or the Office of Appeals sends the Regional Director a memorandum recommending that a complaint issue, it may suggest a single theory on which to proceed or alternative theories, with the choice of theories to depend on what further facts may be developed in a subsequent investigation or what defenses the respondent raises. Even where only one theory is suggested, the Regional Director may find it necessary to amend the complaint and change the prosecution theory in the light of the evidence developed at the hearing or the respondent's defenses. Where the Office of Appeals overrules the Regional Director's decision not to issue a complaint and directs that the case go forward, attorneys from the Office of Appeals may go to the regional office to assist in trying the case, and, in this joint effort, the legal theory may undergo further refinement.

The fact that the General Counsel has voluntarily made public memoranda in closed cases (Pet. Br. 10, n. 12) and published excerpts from memoranda in significant cases in his Quarterly Report (Pet. Br. 46, n. 34) does not weaken the importance of preserving the confidentiality of those documents in pending cases, in order to protect the government's litigation strategy and decisions. In signing the

Freedom of Information Act, President Johnson encouraged government officials to make information available to the fullest possible extent. 2 *Weekly Compilation of Presidential Documents* 895 (July 11, 1966). The limited disclosure the General Counsel will make furthers this policy without jeopardizing the important government interest in maintaining the confidentiality of internal documents relating to matters currently in litigation.

2. Sears (Br. 20-21) and Clearinghouse (Br. 33-35) argue that advice and appeals memoranda are "statements of policy and interpretations which have been adopted by the agency" within the meaning of Section 552(a)(2)(B) of the FOI Act. The General Counsel, however, neither "adopts" advice and appeals memoranda as his official "policy" or "interpretation," nor uses them as a controlling body of precedent. They are not "adopted" as policy merely because a subject matter file of memoranda has been kept in the Division of Advice for convenience in staff research.[6] Finally, the contention that advice and appeals memoranda represent a body of "adopted" agency policy is belied by Sears' complaint (Br. 26-27) that these supposedly precedential decisions are memorialized in an unusable and "incomplete" form, failing in many instances to state the "significant facts upon which the decision hinged."

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[6]Sears' contention (Br. 8, n. 10) that the General Counsel "represented to the lower courts that the Appeals decisions—General Counsel's Minutes — have been indexed by subject matter since August, 1971" is erroneous. Our brief in the court of appeals (p. 29, n. 23) only noted that the General Counsel was "preparing an index for appeals letters and memoranda." This involved, as a first stage, developing a system of index categories, a task that has not yet been completed. Accordingly, as of this time, appeals letters and memoranda are still not filed by subject matter. The preparation of an appeals index, which we believe is not legally required, has been delayed because other projects have taken priority — *e.g.*, the preparation of an index for Regional Directors' decisions in representation cases (see *Automobile Club of Missouri* v. *National Labor Relations Board*, 84 LRRM 2423 (D. D.C.), affirmed, 495 F.2d 1074 (C.A.D.C.)).

3. Section 552(a)(2)(C) of the FOI Act requires disclosure of "administrative staff manuals and instructions to staff that affect a member of the public." Clearinghouse contends (Br. 36-37) that this provision covers advice memoranda, because the Senate Report (at p. 2), in explaining the insertion of the limiting term "administrative," stated that the limitation would protect the confidentiality of "instructions to Government personnel prosecuting violations of law *in court*" (emphasis added). This statement, Clearinghouse insists, "leaves no alternative" to the holding that the only enforcement instructions Congress intended to keep confidential were those relating to court enforcement and that those relating to administrative enforcement must be made public.

None of the cases interpreting Subsection (a)(2)(C) has made such a distincition, and with good reason.[7] The policy justification for maintaining the confidentiality of law enforcement instructions is equally applicable to both categories of enforcement. In Subsection (a)(2)(C) Congress intended to protect documents pertaining to all law enforcement matters, whether they be before the court or the agency.

4. In our main brief, we argued (pp. 29-36) that advice and appeals memoranda are excepted from disclosure by Exemption 7 which, prior to its amendment, discussed *infra*, excepted from disclosure "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." Sears contends (Br. 23) that Exemption 7 is inapplicable because

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[7]See *Stokes* v. *Brennan*, 476 F.2d 699 (C.A. 5); *Hawkes* v. *Internal Revenue Service*, 467 F.2d 787 (C.A. 6); and *City of Concord* v. *Ambrose*, 333 F. Supp. 958 (N.D. Cal.).

"[a]t issue here are not investigatory files but, instead, a system of law contained in subject-matter files and indices retained in Washington and used for a non-investigatory purpose — the resolution of related future cases." Advice and appeals memoranda, however, analyze the results of the investigation of the unfair labor practice charge, and, if it is determined that the charge warrants prosecution, they contain the "blue prints" for that prosecution. Accordingly, those memoranda are properly a part of "investigatory files compiled for law enforcement purposes."

Exemption 7 is not rendered inapplicable to advice and appeals memoranda by the recent revision of that exemption.[8] The new Exemption 7 reads as follows:

> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel * * *. [Pub. L. No. 93-502, Sec. 2(b), 88 Stat. 1563-1564.]

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[8]The FOI Act was amended by Pub. L. No. 93-502, 88 Stat. 1561, November 21, 1974. The amendments take effect on February 19, 1975 (90 days after the date on which Congress overrode the President's veto).

The purpose of this revision, as explained by its principal sponsor, Senator Hart, and others who supported it, was to change the construction of Exemption 7 in *Weisberg* v. U.S. *Department of Justice*, 489 F.2d 1195 (C.A.D.C.), certiorari denied, 416 U.S. 993, and to return to what they contended was the intent of Congress in originally enacting Exemption 7. See 120 Cong. Rec. S9329-S9337, *passim* (daily ed., May 30, 1974). In *Weisberg* the court of appeals held that all the government had to show to prevail under Exemption 7 was that the file (1) was "investigatory" and (2) was compiled for law enforcement purposes. Congress intended by this amendment to eliminate any blanket exemption for investigatory *files* and, instead, to require that *records* in those files, before qualifying for the exemption, satisfy the purposes for which the exemption was created. Thus, Senator Hart observed (*id.* at S9330):

> The purpose of the Freedom of Information Act is to provide maximum public access while at the same time recognizing valid governmental and individual interests in confidentiality. This amendment balances those two interests and is critical to a free and open society. This amendment is by no means a radical departure from existing case law under the Freedom of Information Act. Until a year ago [when *Weisberg* was decided], the courts looked to the reasons for the seventh exemption before allowing the withholding of documents. That approach is in keeping with the intent of Congress and by this amendment we wish to reinstall it as the basis for access to information.

See also the colloquy between Senator Hart and Senator Kennedy, *id.* at S9336.

As shown in our main brief (pp. 31-32), advice and appeals memoranda, and their underlying documentation gathered in investigations of unfair labor practices, come within Exemption 7 "in light of" its "language and purposes." The disclosure of such memoranda would impair the purposes of the exemption, which the Second Circuit described in *Frankel* v. *Securities and Exchange Commission*, 460 F.2d 813, 817, certiorari denied, 409 U.S. 889, as the prevention of "the premature disclosure of the results of an investigation so that the Government can present its strongest case in court" and the protection of the confidentiality of "the procedures by which the agency conducted its investigation and by which it has obtained information." The inclusion of subparagraphs (A), (D), and (E), *supra*, in the amended Exemption 7 shows that it was intended to afford the same protection.

For these reasons as well as those set forth in our opening brief, the judgment of the court of appeals should be reversed and the case should be remanded to the district court with directions to dismiss the complaint.

Respectfully submitted.

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